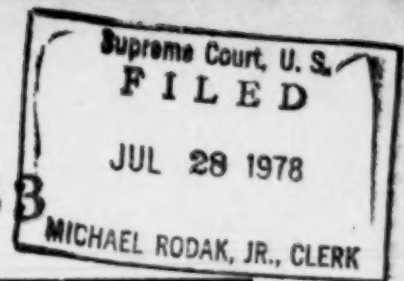


No. **78-163**



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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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L. D. McFARLAND COMPANY, Petitioner

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*PETITION FOR A WRIT OF CERTIORARI TO  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

GEORGE J. TICHY  
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# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. \_\_\_\_\_

L. D. McFARLAND COMPANY, Petitioner

*v.*

NATIONAL LABOR RELATIONS BOARD

*PETITION FOR A WRIT OF CERTIORARI TO  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

The L. D. McFarland Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit enforcing an order of the National Labor Relations Board under §10 of the National Labor Relations Act, as amended. (61 Stat. 136, 73 Stat. 519; 29 U.S.C. § 151 *et seq.*)

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 572 F.2d 256. It is also set forth in Appendix B, *infra*, pp. 23. A timely petition for rehearing was denied on May 4, 1978. The order denying the petition is set forth in Appendix C, *infra*, pp. 33. The decision and order of the National Labor Relations Board, hereinafter called the "Board," is set forth in Appendix E, *infra*,

pp. 3<sup>a</sup>, and is also reported at 219 N.L.R.B. 575.

### JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1978. (Appendix D, *infra*, pp. 38 ). This Court has jurisdiction under 28 U.S.C. §1254 (1) and §10(e) of the National Labor Relations Act, as amended. (29 U.S.C. §160(e)).

### QUESTIONS PRESENTED

1. Did a labor union's conditional offer of a waiver of initiation fees set forth in its letter to eligible employees about four (4) days before the conduct of a National Labor Relations Board representation election, affirming remarks made by union organizers to such employees in a pre-election organizational meeting, violate the principles set out by this Court in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270 (1973) thereby requiring the results of such election to be set aside and the employer thereby relieved of any obligation to bargain with that labor union?

2. In evaluating and interpreting a labor union communication to eligible employees made shortly before a National Labor Relations Board conducted representation election, must the communication be evaluated and interpreted by the Board, as written, from the viewpoint of the employee recipients or may the Board supply meanings or words not used nor manifest in such communication?

3. Does the National Labor Relations Board have the right to unilaterally change the agreement of the petitioning labor union and the involved employer, approved by the Board's Regional Director, with respect to the arrangements for the conduct of a representation election made pursuant to §9(c)(4) of the National Labor Act by declining, refusing or failing to carry out its specific terms?

4. Upon an employer timely objecting to conduct affecting the results of a representation election or objecting to conduct of a representation election made pursuant to 29 C.F.R. §102.69(a) and (c):

(a) Is the National Labor Relations Board obligated to engage in a comprehensive, in depth, impartial investigation of the

conduct to which objections are made, not limiting itself to the leads provided by the employer?

(b) Is the employer obligated to do any more than provide the Board with basic information upon which it bases its belief that improper union conduct occurred which affected the obligation of the Board to conduct a representation election in such a manner as to ensure a fair and free choice of bargaining representative under §9(c)(1)(A) of the Act?

(c) Is the employer obligated to conduct an investigation to support its objections which could result in its commission of an unfair labor practice under the National Labor Relations Act, as amended?

(d) Can the National Labor Relations Board assert its own promulgated rule (29 C.F.R. §102.67(f)) to refuse to consider evidence provided by the employer in an unfair labor practice proceedings which had been made available to the Board in the course of its investigation of objections filed in the representation proceedings but which it did not either choose to obtain or which it chose to ignore?

### STATUTES AND REGULATIONS INVOLVED

The relevant statutory provisions are set forth in Appendix F, *infra*, pp. 58. Those provisions are: §7, §8 (a)(1) and (5), §8(c), §9(a), §9(c)(1)(A), and §9(c)(4) of the National Labor Relations Act, as amended. (61 Stat. 136, 73 Stat. 519; 29 U.S.C. §157, §158(a)(1) and (5), §159(a), §159(c)(1)(A), and §159(c)(4))

The relevant regulatory provisions of the National Labor Relations Board are set forth in Appendix G, *infra*, pp. 61. Those provisions are: 29 C.F.R. §102.67(f) and 29 C.F.R. §102.69 (a) and (c).

### STATEMENT OF THE CASE

#### I. THE REPRESENTATION PROCEEDINGS

Pursuant to a petition filed by the Union<sup>1</sup> on March 2, 1973,

<sup>1</sup> Willamette Valley District Council of the Lumber and Sawmill Workers Union.

a Stipulation for Certification upon Consent Election was executed by the Employer and Union and approved by the Regional Director in N.L.R.B. Case No. 36-RC-3067. R. 3A, 4-5<sup>2</sup>

As a result of the foregoing Stipulation a secret ballot representation election was scheduled for Wednesday, April 25, 1973, between the hours of 4:00 p.m. to 5:00 p.m., in the Boiler Room of the Employer's plant. Notices were posted at the plant advising employees accordingly. R.7, 95

#### A. THE UNION'S OFFER TO WAIVE INITIATION FEES

Under date of Saturday, April 21, 1973, a letter was prepared by the Union and placed in the mails, received by many of Petitioner's employees on Monday, April 23, 1973, two days prior to the date of the election. That letter in its entirety is reproduced at Appendix A., *infra*, p. 20. R.19-20, 44-45, 66-67 The key elements of that letter are these:

1. It is directed "TO EMPLOYEES OF MC FARLAND COMPANY, EUGENE DIVISION." (Emphasis supplied.)

2. It is dated April 21, 1973 and placed in the mail to Employer's employees on that date. This would result in its receipt, in the usual course of the mails, on Monday, April 23, just two days before the election.

3. The letter is a hard, aggressive effort to get the Employer's employees to vote for the Union in the representation election. It is *not* an effort to persuade employees to sign authorization cards to be able to petition for the election. The Union apparently already had the necessary showing for that purpose.

<sup>2</sup> "R" references are to Volume I of the Record in the Court of Appeals. There was no trial or hearing and therefore no transcript of testimony. Petitioner sought to have a copy the Record in this matter filed with this Petition. However, the Clerk of the Court advised that the Record would not be prepared unless the writ is granted or prior thereto a request is made for the Record by this Court. As a result, this Petition has been made to be complete in itself. References remain herein should the Court decide it would like the Record in considering this Petition.

4. Near the end of the two page Union letter, the following appears in the following precise manner:

"WE URGE YOU TO VOTE YES FOR THE UNION ON APRIL 25th.

"THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT.

"THERE WILL BE NO MONTHLY DUES UNTIL A CONTRACT IS NEGOTIATED."

Attention is directed specifically to the second quoted paragraph above, and to the words "ANY MEMBER PRESENTLY WORKING." This is reproduced in capital letters, just as in the original letter.

Approximately ten days or two weeks before the representation election, the Union held a meeting at which a number of this Petitioner's employees were present. In this meeting Union representatives made the point that McFarland employees *who were or became members* of the Union *prior to the election* would not have to pay any Union initiation fee and that this was a general policy of the Union.<sup>3</sup> R.91

<sup>3</sup> Affidavit of Charles Finney, an employee of the Employer at the time of the representation election. His affidavit states in part: "That he attended a meeting of the Willamette Valley District Council, Lumber, Production and Industrial Workers Union, held about ten days or two weeks prior to April 25, 1973, at the Union Hall, at which the subject of no initiation fee for union members before the date of the election was discussed. (In attendance at this meeting were Clarey Adammson and Lee Harrison who were official representatives of the Willamette District Council of Lumber, Production and Industrial Workers Union. Also in attendance were a large number of employees of the L. D. McFarland Company, Eugene Operation.)

"That while he cannot remember precisely the words used by the Union representatives about the initiation fee, he does recall that the point was made that McFarland employees who were or became members of the Union prior to the election would not have to pay any Union initiation fee and that this was a general policy of the Union.

"That he thereafter received a letter, dated April 21, 1973, signed by Mr. Harrison of the Union which again stated that no initiation fee would

The Board majority, affirmed by a majority in the Court of Appeals, reconstructs the April 21 letter by inserting a new and additional word: "incoming" in front of the word "member" in the capitalized sentence referring to the waiver of initiation fees. This became necessary in order to interpret this letter in a manner circumventing the instruction of this Court in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U. S. 270 (1973). R. 116, 117; Brief for NLRB to Ct. of Appeals, p. 11; Appendix B, *infra*, pp. 23; 572, F.2d at 259.

#### B. THE BOARD'S FAILURE TO COMPLY WITH THE ELECTION AGREEMENT

As discussed, *supra*, p. 4, the labor union and employer had entered into an agreement pursuant to § 9(c)(4) of the National Labor Relations Act, herein called the Act. 29 U.S.C. 159 (c) (4) This Agreement specifically called for the representation election polls to be open from "4:00 p.m. to 5:00 p.m." The polls were opened at 4:00 p.m. by a Board Agent.<sup>4</sup>

be charged by the Union to any Union member working in the plant at that time.

"That he is not sure what the Union intended with regard to initiation fees for employees of McFarland Company who did not become union members before the election because the Union officials were very vague about this at the meeting, but based on the April 21, 1973 Union letter, assumes that they would have to pay the fee if the Union won the election, since the Union letter offered the waiver of the initiation fee only to members presently employed. (That is to say, people who were members before the election.)

"I understood the initiation fee to have been approximately \$35.00 in April, 1973." (R.91.92)

<sup>4</sup> Some time within the first 20 minutes of the election, Union Observer Elmer Hill asked the Board Agent in charge if he could talk to two other employees present in the polling place about whether or not their brother, Elvis McMurrian, was going to come in to vote. The Board Agent acquiesced and Hill asked Estill McMurrian whether or not his brother, Elvis, was coming in to vote. Apparently Estill did not know because Hill then obtained permission from the Board Agent to go to a nearby office, away from the polling place, and phone Elvis' home. He did so and returned to say that no one answered. R.5,7, 93-94

At 4:20 p.m., twenty (20) minutes after the polls were opened, and forty (40) minutes before the polls were stipulated to be closed, and as set forth on the notice posted to employees provided by the Board, the Board Agent, unilaterally and without consulting the Employer or Union, or anyone else, closed the polls. Almost immediately he conducted the ballot count.

At sometime between 4:40 p.m. and 4:45 p.m. Elvis McMurrian showed up at the Boiler Room to vote. The polls were closed. He was so advised by employees present, and left. R. 22-25, 28

The ballots were counted. The results were announced as 16 for the Union, 13 for No Union and two challenged ballots. In what must be regarded as a cover-up in the failure to provide minimal integrity to the voting process and Board procedure, the Board agent made no reference in the Tally of Ballots to the failure to keep the polls open to 5:00 p.m. or to the possibility that an eligible voter presented himself to vote in the stipulated and noticed voting time period and was not permitted to vote, even a challenged ballot. R.5, 9, 22-25, 95 That voter could have resulted in a tie vote and denial of certification to the Union.

#### C. THE BOARD'S INVESTIGATIVE PROCEDURE

The Employer timely filed Objections to Conduct of Election and to Conduct Affecting the Results of Election. R.10-12 The Objections were based on those facts set out herein, *supra*, pp.4 - 6. The Objections were supported by documentation and Employer leads, including a copy of the Union letter of April 21 and written employee statements. R. 5, 7, 10-25, 62-67

An investigation of these Objections was conducted by a Board Agent. Employer representatives and counsel were present with the Board Agent at the plant for a portion of that investigation and provided other leads to employee statements and other matters related to the conduct of the election and conduct affecting the results of the election. Whether or not the Board Agent followed these leads is unknown. However, the Regional Director in his Report on Objections to Election

ruled that the Union letter of April 21 was proper.<sup>5</sup>

Without regard to the Stipulation of the Parties, and the Board's failure to comply with its specific terms, the Regional Director dealt with the eligibility of Elvis McMurrian as a voter in the election and found him to be ineligible. Based on this analysis, he recommended Certification of the Union as bargaining agent. R. 26-29 The Employer timely filed Exceptions to this Report.<sup>6</sup> R. 30-45 The Board issued its Decision and Certification of Representative approving Regional Director's Report, noting in passing:

"In adopting the Regional Director's determinations as to objection 1, we are continuing to adhere to our policy with respect to the waiver of dues and initiation fees, as expressed in *DIT-MCO, Incorporated*, 163 NLRB 1019; *Hughes & Hatcher, Inc.*, 176 NLRB 1103; and subsequent cases, pending U. S. Supreme Court review of this policy *N.L.R.B. v. Savair Manufacturing Co.*, 470 F.2d 305 (C. A. 6), Cert. granted 411 U. S. 964 (May 7, 1973)."<sup>7</sup>

R. 47, note 2

At no time during the representation proceedings or these unfair labor practice proceedings, was the evidence obtained by the Board Agent disclosed by the Board.

<sup>5</sup> The Report is dated July 12, 1973 and precedes the decision of this Court in the *Savair Manufacturing Co.* case, *supra*. R.29

<sup>6</sup> The Employer urged that if the Board was unpersuaded by the evidence adduced by the Board's investigation and the matters presented by the Employer, it should conduct an evidentiary hearing to obtain all of the relevant and material facts necessary to a decision. R.41 In addition, the Employer pointed out that while its second objection included the conduct that occurred during the election period, e.g., permitting employees to remain in the voting area, carrying on conversations, etc., to remove any doubt it was moving to amend its objections to incorporate this additional basis for setting aside the election. R.42

<sup>7</sup> This Board decision, issued December 14, 1973, precedes the Decision of this Court in *N.L.R.B. v. Savair Manufacturing Co.*, *supra*, which was issued on December 17, 1973, by three days.

## II. THE UNFAIR LABOR PRACTICE SUMMARY PROCEEDINGS

As is necessary under Board procedure, in order to obtain review of an adverse Board determination in a representation matter, the Employer refused to bargain with the Union. This is a technical device to initiate that appeal and review procedure.

On May 29, 1974, the Union filed unfair labor practice charges contending a refusal to bargain. R.49 An unfair labor practice complaint and notice of hearing was perfunctorily issued by the Regional Director. The N.L.R.B. General Counsel filed a Motion for Summary Judgment and the notice of hearing was vacated. Had this case gone to trial the Employer would have been able to subpoena all the witnesses who participated in the investigation of the Employer's Objections. Their affidavits given to the Board Agent during the investigation would have been subject to a subpoena duces tecum.<sup>8</sup> However, the refusal of a trial through this diversionary tactic, the Motion for Summary Judgment, appears to be no less than a blatant attempt to deny due process and to cover up what the Employer believes to have been a miscarriage of justice in the handling of the election and the investigation of the Objections to the Election. The Regional Director failed (or refused) to disclose the factual evidence used in the investigation of the Objections. *The Employer cannot subpoena witnesses and had no other available means to obtain evidence critical to its case.* Furthermore, since the Board has adopted the rule that issues raised or which could have been raised in a representation proceedings cannot be relitigated in an unfair labor practice proceeding,<sup>9</sup> the Board not only predetermined the result before its Motion for Summary Judgment was ever filed but effectively denied the

<sup>8</sup> Affiants have right to own affidavit. Compulsory process will issue to such affiant. This Court should also look to the validity of the Board rule 29 C.F.R. §102.118 relative to Board secrecy of testimony and documents once an unfair labor practice matter evolves.

<sup>9</sup> 29 C.F.R. §102.67(f) set forth in Appendix G, *infra*, p.

Employer an opportunity to develop its factual record. This Board technique resulted in depriving the Employer of due process. This course of action also effectively maintained the secrecy of its investigative process so that the Employer was and is unable to learn what leads were followed.

This procedure is what gives rise to the several questions of the extent of the responsibility of the Employer in the investigative process and the responsibilities of the Board, including the validity of the Board rule<sup>10</sup> by which the scope, depth and effectiveness of the Board investigation is never known or capable of being probed. It is also an incident to this procedure as to the propriety of the use of a Motion for Summary Judgment in these kinds of proceedings.

### III. THE BOARD'S THREE TO TWO SPLIT DECISION

The Employer responded to the NLRB General Counsel's Motion for Summary Judgment and filed one of its own, attaching employee statements and other documentation.<sup>11</sup> R.88-111

The Board majority found that the April 21 letter did not offend the *Savair* principle by reinterpreting the rule and minimizing the reference that the employee had to become a "member" and be "presently working in the plant" to benefit.<sup>12</sup> This view ignores the effect of employees signing union  
<sup>10</sup> *ibid.*

<sup>11</sup> While the Employer believed there was no necessity for parole evidence to explain the meaning of the Union's April 21 letter, it pointed out that if there was any doubt, the Board had three alternatives: (1) accept the Affidavit of Charles Finney; (2) apply the NLRB rule of *Inland Shoe Mfg. Co., Inc.*, 211 NLRB 78 (1974) by which it was the Union's duty to clarify any ambiguity or suffer the consequences; or (3) hold an evidentiary hearing to obtain the facts.

<sup>12</sup> As argued in its Brief to the Court of Appeals, Board's counsel stated "For, as the Board pointed out, those employees becoming 'members' are the only ones on whom an initiation fee is imposed and the shorthand use of the term 'members' to describe *incoming* members does not tie the waiver to pre-election support of the Union and places no requirement upon employees to join the Union *before* the election. (R.116, 117)."

authorization cards or recognition slips before an election.<sup>13</sup> The Board majority rejected the affidavit of Charles Finney on the subject of the Union initiation fee waiver. This was done under the questionable Board rule, 29 C.F.R. § 102.67(f), by which the Board seeks to preclude relitigating in unfair practice cases matters which could be raised in a Board representation proceeding. The Board investigation should have developed this same information since the Employer provided this lead to the Board Agent.

The Board minority, members Kennedy and Penello, would deny the General Counsel's Motion and grant the Respondent's Motion for Summary Judgment. Their opinion is also set forth at Appendix E, *infra*, pp. 39 and states in part:

"Four days before the election, the Union transmitted a letter to the employees which stated in pertinent part:

THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT.

The majority finds this waiver to be permissible under *Savair*, *supra*, because it 'in no way [implies] that eligible voters would have to pay . . . initiation fees unless they joined the Union prior to the election.' In our view, the majority simply ignores the plain meaning of the waiver language.

"In waiving initiation fees for 'any member presently working in the plant,' the Union has clearly established two

NLRB Brief to Court of Appeals p. 11. This concept, supplying the word "incoming" to the Union letter and ignoring the employee's reaction to the letter, as written, was accepted by the Court of Appeals Majority. Appendix B, *infra*, pp. 23. 572 F.2d at 259

<sup>13</sup> "Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the Union. His outward manifestation of support must often serve as a useful campaign tool in the Union's hands to convince other employees to vote for the Union, if only because many employees respect their co-workers' views on the unionization issue. By permitting the Union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the Union to buy endorsements and paint a false portrait of employee support during its election campaign." *N.L.R.B. v. Savair Manufacturing Co.*, 414 U. S. at 277

prerequisites for qualifying for the waiver: (1) the individual must have been 'presently working' at that point in time in the plant, and (2) the individual must be a 'member.' Accordingly, the conditional waiver does not apply to all employees in the unit — it applies to those who have become *union members* before the election.

"The waiver here represents precisely the type of improper 'endorsement buying' which the Supreme Court sought to eradicate in *Savair, supra*. In the words of the Court:

'By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip [i.e., joining the union] prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign. 414 U. S. at 277.'

Such is precisely the effect of the conditional waiver here."<sup>14</sup> R.126-127; Appendix E, *infra*, pp. 52-55.

#### IV. THE COURT OF APPEALS SPLIT DECISION

The Court majority accepted the Board finding that the term "member" was a shorthand form for "incoming member" resulting in technically validating the April 21 letter. The Court majority also ignores the effect of a Stipulated election agreed upon by the Employer and Union, circumventing that issue as the Regional Director did, by going on to determine whether or not the individual who presented himself was ultimately an eligible voter. The majority also chose not to deal with the issue of whether or not the "laboratory conditions" of the election were a part of the original issues raised by the Employer, instead avoiding that issue by regarding it as a new issue, allegedly first filed in an untimely manner. Finally, the majority ruled that the Employer was not entitled to a hearing. Appendix B, *infra*, pp. 23 ; 572 F.2d at 258-261

Judge Choy dissented, briefly and to the point:

"Since I cannot conscientiously find that the evidence supporting the Board's majority decision is substantial, I

<sup>14</sup> Footnotes omitted. Supreme Court citation supplied.

dissent. *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 488 (1951); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 230 (9th Cir. 1971). Rather, I agree with the two dissenting members of the Board that the plain meaning of the Union's waiver of initiation fees, which was communicated to the company employees four days before the union election, violated the rule of *NLRB v. Savair Manufacturing Co.*, 414 U. S. 270 (1973).

"The three majority Board members' reading of the waiver by inserting the word 'incoming' before 'member' is unwarranted. The sentence, 'There will be no initiation fee for any member presently working in the plant.' must be read through the eyes of the employees of the company who were the targets of the waiver. It seems only natural to me that they concluded that they must *be presently working there and be members* of the union — prior to the election, not afterwards. I believe the minority Board members were entirely correct in their conclusion that the conditional waiver had the proscribed effect of allowing the union 'to buy endorsements from the employees and thus painted a false portrait of employee support during its election campaign.' *Savair*, 414 U. S. at 277." Appendix B, *infra*, p. 32; 572 F.2d at 261-262.

#### REASONS FOR GRANTING THE WRIT

##### I. THE BOARD AND COURT MAJORITY DECISION CONFLICTS WITH THIS COURT'S SAVAIR DECISION

The majority of the Court of Appeals, and the Board majority, have decided this matter in complete and direct contravention with the principles and the rule of this Court in its decision in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U. S. 270 (1973). Those decisions are so clearly contrary to the *Savair* decision as to warrant a memorandum decision of this Court granting the writ, vacating Judgment and remand to the Court of Appeals to dispose of this matter in conformity with the *Savair* decision without modification of the letter to employees.

*Denham v. N.L.R.B.*, 411 U. S. 945 (1973). See also *Tonasket v. Washington*, 411 U. S. 451 (1973).

The Board majority, affirmed by the Court majority, declines and refuses to interpret the letter as written to the employees, instead supplying a word "incoming" in order to justify a circumvention of the clear teachings of the *Savair* decision.

The sentence critical to the evaluation of this letter is:

"THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT." R. 20, 45, 67; Appendix A, *infra*, p. 22; (Emphasis supplied).

The Union authors of this letter knew the difference between "employees" and "members." The letter was addressed to "employees." R.19, 44, 66 Appendix A., *infra* p. 20. Nevertheless, the critical sentence clearly utilizes the word "member" and limits the offer to those "presently working in the plant." This offer does not extend itself to anyone not employed in this plant on April 21, 1973. The proposal is obviously extended, in the context of this letter, to get those "presently working in the plant," i.e., those eligible to vote in the election, to vote "Yes" in the April 25 election. Otherwise there would be no purpose for this paragraph. This paragraph is independent of the following paragraph in which a separate proposal is made with respect to the waiver of dues.

As Judge Choy so eloquently concludes in his dissent:

" \* \* \* the plain meaning of the Union's waiver of initiation fees, which was communicated to the company employees four days before the union election, violated the rule of *N.L.R.B. v. Savair Manufacturing Co.*, 414 U. S. 270 (1973)." Appendix B, *infra*, p. 32; 572 F.2d at 261-262.

There is no need for parole evidence. The letter should be read as written. However, even if the Board required such evidence, there is more than adequate parole evidence to support the plain meaning of the pertinent passage. There is the affidavit of Charles Finney, an eligible employee, who attended a union meeting several days before the letter was distributed, who confirms that it was the intent of the union to waive the

dues for those who joined the Union before the election. If this letter is deemed to be ambiguous, and it is apparent that the Board majority, accepted by the Court majority, found it necessary to supplement the written words involved, then the principle should have been applied that any ambiguities involved are to be construed against the author of the letter, i.e., the Union. *Inland Shoe Mfg. Co., Inc.*, 211 NLRB 78 (1974).

It is the emphatic admonishment of this Court that while Congress has granted the Board a wide discretion to ensure the fair and free choice of that bargaining representative, the Board's procedure must include safeguards to ensure the fair and free choice of that bargaining representative by employees. *N.L.R.B. v. Wyman-Gordon*, 394 U. S. 759, 767 (1969); *N.L.R.B. v. Tower Co.*, 329 U. S. 324, 330 (1946); *N.L.R.B. v. Waterman S. S. Co.*, 309 U. S. 206, 226 (1940). The thrust of these and other decisions of this Court, including the *Savair* case, is that it should be the free and unfettered choice of the employees that shall be protected, and not that of either the Union or the Employer. The Board is to be completely neutral and impartial, as is the clear teaching of § 7 of the Act. 29 U.S.C. § 157; Appendix F, *infra*, p. 58.

This Court in the *Savair* case also observed that there is no provision for a Union unfair labor practice for abusing employee rights under § 7 of the Act, but noted that § 8(c) of the Act contemplates that any communications to employees shall contain "no threat of reprisal or force or promise of benefit." 414 U. S. at 278-279. 29 U.S.C. § 158(c); Appendix F, *infra*, p. 58.

This Court also emphasized the impact that signed Union authorization cards can have on other employees, including the impact of forcing recognition of a Union in the application of *N.L.R.B. v. Gissel Packing Co.*, 395 U. S. 575 (1969). This Court concluded in the *Savair* decision:

"\* \* \* The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union win. That influence may well have had a decisive impact in this

case where a change of one vote would have changed the result." 414 U. S. at 281

There can be no doubt, the Board and Court majority have clearly circumvented this Court's *Savair* decision, creating a conflict requiring review for correction.

## II. THE RESPECT TO BE GIVEN THE AGREEMENT OF THE PARTIES IN BOARD REPRESENTATION MATTERS REQUIRES THIS COURT'S REVIEW

This Court also stated in *Savair*:

"The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a non-union shop or for a non-union shop and against a union." 414 U. S. at 280.

This premise forms the basis for another reason that the writ should be granted in this matter. Section 9(c)(4) of the Act allows the use of a stipulation of the parties in lieu of a hearing in representation election matters. 29 U.S.C. § 159(c)(4). The Board has established regulations to guide this alternative. 29 C.F.R. § 102.62. The essence of this matter is an agreement entered into by the Union and Employer that spells out, among other things, when the election shall be held, including date and hours, and the place where the election will be held. Such an agreement requires, and here received, the approval of the Regional Director. In this instance, it was agreed that the election would be held between the hours of "4:00 P.M. and 5:00 P.M." on April 25, 1973. The Regional Director and Board, as well as the Courts of Appeal majority, circumvent the issue of the forty minute premature closure of the polls by dealing with whether or not the individual who showed up to vote in the authorized, agreed upon voting period, was eligible or not. The issue, however, is whether or not there is an obligation to comply with the agreement of the parties, even if it means that the Board Agent must sit in waiting for a total of 40 minutes, though nothing happens. This Court has not passed upon this issue although several Court of Appeals have done so. Each of those cases have ruled that the agreement of the parties prevails

in the handling of the representation election. The Regional Director, for the Board, has had the opportunity to approve the agreement before it is to be effectuated. Having done so, the agreement prevails. *N.L.R.B. v. Midwest Television, Inc.*, 370 F.2d 287 (7th Cir. 1966); *Tidewater Oil Co. v. N.L.R.B.*, 358 F.2d 363 (2nd Cir. 1966); *N.L.R.B. v. J. J. Collins' Sons, Inc.*, 332 F.2d 523, 525 (7th Cir. 1964); *N.L.R.B. v. Joclin Manufacturing Co.*, 314 F.2d 627 (2nd Cir. 1963); *N.L.R.B. v. Detective Intelligence Services, Inc.*, 448 F.2d 1022 (9th Cir. 1971) is in accord although the agreement was found ambiguous, permitting Board interpretation. See also *General Drivers and Helpers Union, Local 554, Teamsters v. Young and Hay Transportation Co.*, 522 F.2d 562 (8th Cir. 1975).

To fail to deal with this precise issue, by circumventing it, effectively denies the principle itself. Since there has been circumvention and this Court has not dealt specifically with the gravity and impact of agreements of the parties in representation proceedings, the Court is urged to grant the writ here on this basis as well.

## III. THE BOARD'S SUMMARY JUDGMENT PROCEDURE, COUPLED WITH ITS RULE AGAINST RELITIGATION OF REPRESENTATION ISSUES, THE ABSENCE OF THE RIGHT TO COMPULSORY PROCESS, BOARD NON-DISCLOSURE OF INVESTIGATIVE EVIDENCE COMBINE FOR A "CATCH 22" WHICH DEFIES FUNDAMENTAL DUE PROCESS, JUSTICE AND FAIRNESS

The concluding issue warranting a writ from this Court goes to the integrity of the Board's investigative process. Within that issue is the propriety of the Board's handling cases, such as this one, by use of the Motion for Summary Judgment, thereby foreclosing a party in its ability to produce, by subpoena or otherwise, the necessary evidence to provide the Board with all of the facts. This attacks the validity of the Board's promulgated rule by which it seeks to make its representation decisions impregnable and unassailable — more particularly the Board's rule precluding relitigating any issues that could be raised in a

representation proceeding.<sup>15</sup>

This circle thwarts due process, because, as here, there is no divulging of the results of the Board's investigation. Obviously, the Board is not going to accept the Employer's investigation or the results of that investigation, so that it is necessary that there be a thorough, in depth, comprehensive Board investigation of the issues raised. An employer, or other objecting party, can do no more than provide leads, copies of communications and the like. That is precisely what was done here. Yet, the only manifestation of the results of that investigation is the Report of the Regional Director which deals with conclusions, not with the precise factual elements resulting from the investigation in question. When the employer knows, as here, that certain consequences should have come from this investigation, including the substance of the Charles Finney Affidavit, questions arise as to the integrity and fairness of that investigation. R.91-92

The failure to disclose the results of the investigation, while acting upon it, results in the Board acting as the investigator, the prosecutor, the defender and the adjudicator, certainly not in accord with the concepts of a fair hearing or due process.

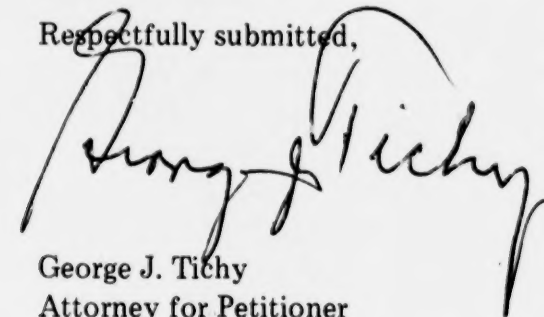
With a self-created impregnable rule barring relitigation of issues that may be raised in the Board's representation proceedings, the Board succeeds in thwarting a hearing or trial and more importantly the development and disclosure of a record for appeal to the Court, when the unfair labor practice complaint is filed. Such a record is essential to question obvious shortcomings of the Board's own process. This again compounds the frustration of the concepts of a fair hearing or due process. But for the fact that the Employer here gave the Board's investigator a copy of the April 21 letter, there is a question that applying the Board's self-preserving rules, it would have been considered, or perhaps even located. The Board, affirmed by the Court Majority, refuses to allow the affidavit of Charles Finney because of this self-preserving rule. R.118 The Petitioner has not found where this Court has dealt

with this subject. The need to deal with this subject is in the interests of the fair and proper administration of the National Labor Relations Act. It is respectfully urged that the writ be granted and include this question.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



George J. Tichy  
Attorney for Petitioner

July 27, 1978

<sup>15</sup> 29 C.F.R. 102.67(f) set forth in Appendix G, *infra*, p. 61.

## APPENDIX A

TO EMPLOYEES OF MC FARLAND COMPANY, EUGENE  
DIVISION

Dear Sir:

A notice of Election should now be posted in the plant. We urge each of you to read this printed matter on this notice. It spells out briefly your rights as provided by Federal Law regarding this matter of Union Representation.

Of course, all these ridiculous letters, the sweet talk from Company Officials and even the KEG party are all a part of a well planned scheme designed to persuade you to vote against the union and continue to deny yourself the rights guaranteed by this Law . . . W H Y ?

*SIMPLY BECAUSE THE COMPANY WOULD LIKE TO CONTINUE ENJOYING EXCESSIVE PROFITS AT THE WORKERS EXPENSE.*

The Companys letters refer to our Union as trouble makers — Our Union represents employees at McFarlands competitors plant just a short distance away. We encourage you to contact any of our members at the J. H. Baxter plant and find out for yourself about this trouble making, you might also ask them about their wages, fringe benefits and working conditions since they elected our union representation.

If you elect our Union to represent you in this election next Wednesday the Federal Law requires that the Company meet and bargain IN GOOD FAITH with your committee and representatives of the Union . . . this we would expect and demand, however, we realize the importance of a working relationship that requires honesty and fairness of both parties . . . this is our Unions practice and policy. We will endeavor to establish this policy in negotiations with your Company.

I'm sure you have noticed in the Companys letters how they attempted to emphasize many misleading statements about the Union which as you already know are completely false. They were also very liberal with their derogatory remarks about our officers and representatives, but the facts are, we have a group of very highly respected people who are skilled and professionally experienced in the art of collective bargaining and this fact is certainly reflected in the progress we have made in the areas of wages, working conditions and fringe benefits now contained in our working agreements.

If you elect our Union to represent you, you will elect committees working in your plant to represent you. At your request representatives of the Willamette Valley District Council, The Western Council and the United Brotherhood of Carpenters and the Business Agent of the Local will be a member of your plant committee, all will be available to assist in negotiating a working agreement and any other matter when requested to do so.

Regular monthly meetings will be set up at your plant where members may present any problems they may have to the committee to be resolved.

In closing we would call to your attention the very clever phrases contained throughout the Companys letters. They may have led some of you to believe they are offering you something if you will vote against the Union. If you carefully analyze them you will find just a bunch of fancy words with no real commitment whatsoever.

Between now and the election you will no doubt be subjected to very HIGH POWERED sales talks by your company

officials in an attempt to sway your vote . . . *DON'T BE MIS-LED.*

WE URGE YOU TO VOTE YES FOR THE UNION ON APRIL 25th.

THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT.

THERE WILL BE NO MONTHLY DUES UNTIL A CONTRACT IS NEGOTIATED.

Should you have any questions about the Union or if we can be of any assistance, please feel free to call our office or come by. The phone No. is 686-1226, our office is at 2300 Oakmont Way in Eugene, Room 101.

Sincerely,

YOUR UNION COMMITTEE

L. C. Harrison, Representative  
Willamette Valley District Council  
of Lumber & Sawmill Workers

APPENDIX B

**FILED**

**MAR 27 1978**

EMIL E. MELFI, JR.  
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 75-3364

OPINION

NATIONAL LABOR RELATIONS BOARD, Petitioner

*v.*

L. D. McFARLAND COMPANY, Respondent

On Application for Enforcement of an Order of  
The National Labor Relations Board.

Before: ELY and CHOY, Circuit Judges, and  
HALL,\* District Judge

ELY, Circuit Judge:

The National Labor Relations Board (Board), pursuant to Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (the Act), petitions for enforcement of its Order, issued on July 28, 1975. The Board's Decision and Order is reported at 219 NLRB 575 (1975) and holds that the respondent L. D. McFarland Company (Company) violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union.<sup>1</sup> We are convinced that the Board's Petition should be granted and that its Order must be enforced.

\*Honorable Peirson M. Hall, Senior District Judge, Central District of California, sitting by designation.

<sup>1</sup> Willamette Valley District Council, Lumber and Sawmill Workers Union.

### FACTS

Pursuant to an agreement between the Company and Union, a consent election was held at the Company's Eugene, Oregon, facility on April 25, 1973. The employees voted 16 to 13 in favor of the Union, with two challenged ballots.<sup>2</sup>

The Company thereafter filed two timely objections to the election, alleging that the election was invalid because (1) the Union had improperly induced employees to vote for the Union by offering to waive dues and initiation fees, and (2) the Board agent conducting the election had closed the polls early, thereby denying a potentially eligible employee the opportunity to vote. After an administrative investigation, the Regional Director rejected the Company's claims and recommended that the Union be certified, finding no impropriety in the Union's waiver of fees and dues and finding also that the putative voter was ineligible because he had been previously laid off permanently without any prospect of being recalled. The investigation revealed that on or about April 12, 1973, the potential "voter" had, in fact, become employed elsewhere on a full-time basis.

The Company filed two timely exceptions to the Regional Director's findings and recommendation, reasserting its original objections and claiming that factual questions had been raised which required an evidentiary hearing. Additionally, the Company also added for the first time an objection founded upon alleged conversations taking place in or near the polling area. The Board certified the Union without an evidentiary hearing, rejecting the Company's original two exceptions as raising no substantial or material issues of fact or law warranting reversal of the Regional Director's findings and recommendation and refusing to entertain the added objection on the grounds that it was conclusionary and untimely.

Subsequently, the Company refused to bargain after being requested to do so by the Union. After the filing of an unfair

<sup>2</sup> These challenges were never resolved, since the number of disputed ballots was insufficient to alter the outcome of the election.

labor practice charge by the Union, the General Counsel issued a complaint based on the Company's failure to bargain. The Company conceded its refusal to bargain. It argued, however, that such action was nonetheless lawful, again reasserting its objections that the election was invalid and that the consequent certification of representative was void. On cross motions for summary judgment, the Board rejected the Company's objections and held that the respondent Company had violated the Act. The Board again rejected the Company's request for an evidentiary hearing, finding that all the issues were litigated, or could have been litigated, in the previous representation proceeding and that the Company had not shown any special circumstances warranting a reexamination of the decision reached in the representation proceeding. The Board now seeks enforcement of its Order requiring that the Company bargain in good faith.

### I

The Company here resists the Board's Petition for Enforcement on the ground that the election was invalid and the consequent certification of representative erroneous, reasserting all of its previous objections.

### A

First, the Company contends that the Union improperly offered to waive initiation fees and dues in exchange for the votes of the employees. The foundation for this assertion derives from a letter sent to the employees by the Union four days before the election. The letter stated, *inter alia*:

THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT.

THERE WILL BE NO MONTHLY DUES UNTIL A CONTRACT IS NEGOTIATED.

The respondent Company argues that this Union action violated the standards pronounced in *N.L.R.B. v. Savair Mfg. Co.*, 414 U. S. 270 (1973). There, the Court held that union promises to waive initiation fees are improper and require an election to be set aside if the promise is conditioned upon a showing of pre-

election support for the union. *Savair*, however made equally clear that unconditional offers to waive initiation fees for all employees, including those who become members after the election, are proper. *Id.* at 274, n. 4; *N.L.R.B. v. Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977); *Warner Press Inc. v. N.L.R.B.*, 525 F.2d 190, 196-97 (7th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

The Board here found that the term "member" was a shorthand form for "incoming member" and, consequently, that there was no requirement to join the Union before the election or otherwise support the Union prior to the election as a condition for the waiver of initiation fees. Accordingly, the Board found that "the waiver of dues and initiation fees here was unconnected with support for the Union before the election, unrelated to a vote in the election, and was without distinction between joining the Union before or after the election." 219 N.L.R.B. 575, 576 (1975).

We note at the outset that "Congress has entrusted the Board with a wide discretion in conducting and supervising elections." *N.L.R.B. v. W. S. Hatch Co.*, 474 F.2d 558, 561 (9th Cir. 1973); *N.L.R.B. v. Southern Health Corp.*, 514 F.2d 1121, 1123 (7th Cir. 1975). Accordingly, we are not empowered to overturn findings and conclusions of the Board unless, viewing the record as a whole, we can say with conviction that they are not supported by substantial evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-91 (1951). Here, we are satisfied that the Board did not abuse the discretion entrusted to it. The full record contains ample support for the Board's conclusion that the nexus between pre-election support and waiver of initiation fees forbidden by *Savair* was absent. Similarly, the waiver of dues until an anticipated contract is negotiated is likewise permissible under *Savair*. *N.L.R.B. v. Con-Pac, Inc.*, 509 F.2d 270, 272-73 (5th Cir. 1975); *N.L.R.B. v. Wabash Transformer Corp.*, 509 F.2d 647, 649-50 (8th Cir. 1975).

We are also unpersuaded by the Company's argument that the election should be set aside because the term "member"

was impermissibly ambiguous. The Board rejected this contention and we do also. The Company's reliance upon *Inland Shoe Mfg. Co.*, 211 NLRB 724 (1974), is misplaced. There, the Board set aside an election in which the union distributed literature stating that there would be "no initiation fees for charter members of a new local." *Id.* Further, this representation was accompanied by efforts of the union to obtain authorization cards prior to the election. As the Board stated, the "[e]mployees could well have been induced to become early card signers on the reasonable belief that only thereby could they become 'charter members' eligible for a waiver of initiation fees." *Id.* at 725. Moreover, in other decisions in which the Board set aside an election because of ambiguous offers to waive initiation fees, the term "charter members" or "charter membership" was used in conjunction with active and concurrent efforts to obtain union authorization cards or pledges. See *D.A.B. Indus., Inc.*, 215 NLRB 527 (1974); *Calif. State Automobile Assn.*, 214 NLRB 223 (1974); *Coleman Co.*, 212 NLRB 927 (1974). Neither of these factors are present in this case. Accordingly, the Union offer to waive initiation fees was neither improper nor impermissibly ambiguous.

## B

The Company next argues that the early closing of the polls invalidated the election by destroying the required laboratory conditions. The polls were, by agreement, to remain open from 4 to 5 p.m. on election day. The Board agent conducting the election closed the polls, however, at about 4:20 p.m. after all the voters on the eligibility list had cast ballots. Thereafter, about 4:45 p.m., a potential voter, later determined by the Regional Director's investigation to have been ineligible, arrived at the polling place to vote, but was unable to do so inasmuch as the polls were already closed. The Regional Director rejected this objection because the potential voter was, in fact, ineligible. The Board, in certifying the Union as the bargaining representative, rejected the objection as well, finding no reason to recon-

sider the Regional Director's findings. The Board refused to alter its position in the unfair labor practice proceeding.

The Company's argument on the point has no merit. The Regional Director plainly found that the putative voter had been a temporary employee of the Company, had been laid off permanently with no expectation of recall, and had, in fact, become employed elsewhere by the time of the election. This former employee clearly was not eligible to vote. If an election is to be set aside because of a deviation from the scheduled voting times, it must be affirmatively shown that eligible voters, sufficient in number to affect the result of the election, were disenfranchised as a result of the election. *N.L.R.B. v. Smith*, 438 F.2d 17, 20 (5th Cir. 1971); *Piper Indus., Inc.*, 212 NLRB 474, 476 (1974); *A. D. Julliard and Co.*, 110 NLRB 2197, 2199 (1954); *Repcal Brass Mfg. Co.*, 109 NLRB 4 (1954). This, the Company did not and could not do.<sup>3</sup> Consequently, the early closing of the polls resulted in no prejudice to the Company and cannot justify the invalidation of the election.

### C

The Company's third and last objection to the validity of the election and subesquent certification of the Union is premised on conversations alleged to have taken place between the Union

<sup>3</sup> Respondent Company cites and relies upon *Bonita Ribbon Mills and Brewer Weaving Co.*, 87 NLRB 1115 (1949), for the proposition that the early closing of the polls requires invalidation of the election, regardless of whether any eligible voters were disenfranchised. The main issue in the *Bonita* decision was whether a party had to show that eligible employees were actually prevented from voting by the early closing of the polls or whether the presence of eligible employees who had not yet voted was sufficient. To the extent that *Bonita* may reasonably be read for the proposition that eligibility of disenfranchised "voters" is irrelevant, it is obviously inconsistent with sound public policy, as well as with later Board decisions. See cases cited in text *supra*. Indeed, in *A. D. Julliard and Co.*, 110 NLRB 2197, 2199 (1954), the Board, after citing several cases dealing with deviations in scheduled voting times, including *Bonita*, stated that "[d]isenfranchisement of some eligible voters as a result of the change was affirmatively shown in each of [the] cases."

observer and two employees in the polling area. As noted previously, the Board, in certifying the Union refused to consider the merits of the objection because it was untimely, having been filed well beyond the five-day period that commenced after the tally was furnished to the parties. Five days is the prescribed time period for the filing of such objections. 29 C.F.R. § 102.69. The Company came forward with no evidence of special circumstances justifying the belated filing. The Board did not abuse its discretion in refusing to consider the objection, either in the representation proceeding, or in the unfair labor practice action.

Moreover, we are convinced that no injustice was visited upon the respondent Company. The objection is without merits. *Milchem, Inc.*, 170 NLRB 362, 363 (1968), upon which the Company bases its objection, requires that an election be set aside if there are "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." The Company does not allege that the employees engaged in conversation with the Union observer were voters waiting to cast / / / ballots. Therefore, the Board, even had it considered the merits of the objection, would have been obliged to reject it. See *Sonco Products Co. v. N.L.R.B.*, 443 F.2d 1334, 1337 (9th Cir. 1971).

### II

The Company contends that the Board erred in rejecting its objections to the election without an evidentiary hearing. The applicable rule in our Circuit was set forth in *Alson Mfg. Aero Div. of Alson Indus., Inc. v. N.L.R.B.*, 523 F.2d 470, 472 (9th Cir. 1975):

"It is true that in order to obtain a hearing in a post-election representation proceeding, the objecting party must supply prima facie evidence, presenting 'substantial and material factual issues' which would warrant setting aside the election. 29 C.F.R. § 102.69 (c) It is also correct that a hearing is unnecessary where if all the facts contended for by the objecting party were credited, no

ground is shown which would warrant setting aside the election. *N.L.R.B. v. Smith Industries, Inc.*, 403 F.2d 889, 892 (5th Cir. 1968); *N.L.R.B. v. Harrah's Club*, 403 F.2d 865, 869 (9th Cir. 1968)."

Furthermore, in order to raise "substantial and material factual issues," the objecting party must do more than disagree with the Regional Director's findings and conclusions.

"It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. \* \* \* Mere disagreement with the Regional Director's reasoning and conclusions do[es] not raise 'substantial and material factual issues.' This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing. To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof. (Citations omitted.)"

*N.L.R.B. v. Griffith Oldsmobile, Inc.*, 455 F.2d 867, 868-69 (8th Cir. 1972).

On the record before us, we cannot say that the Board abused its discretion in refusing to conduct an evidentiary hearing as requested by the Company. The respondent Company came forward with no substantial offer of proof to contradict the Regional Director's findings. The only evidence offered by the Company was an affidavit by an employee bearing on the *Savair* issue. This affidavit was belatedly presented for the first time as part of the Company's motion for summary judgment in the present unfair labor practice pro-

ceeding, although its relevancy to the earlier representation proceeding was clear.<sup>4</sup> On this paltry showing, the Company failed to meet its burden of raising substantial and material issues.

We conclude that the Board's Decision and Order was substantively and procedurally proper. Accordingly, its Order will be

ENFORCED

<sup>4</sup> Although the Supreme Court's *Savair* decision was rendered after the representation proceedings here, the relevancy of the offered affidavit had been made clear by judicial authority extant at the time. See, e.g., *N.L.R.B. v. Savair Mfg. Co.*, 470 F.2d 305, 307 (6th Cir. 1972); *N.L.R.B. v. Gilmore Industries, Inc.*, 341 F.2d 240, 242 (6th Cir. 1965); *N.L.R.B. v. Gorbea, Perez, and Morell*, 328 F.2d 679, 682 (1st Cir. 1964). Absent previously unavailable or undiscovered evidence, matters which could have been or were litigated in a representation proceeding cannot be relitigated in the related unfair labor practice case. *N.L.R.B. v. Hatch Co., Inc.*, 474 F.2d 558, 562-63 (9th Cir. 1973).

NLRB v. MC FARLAND, No. 75-3364

CHOY, Circuit Judge, dissenting:

Since I cannot conscientiously find that the evidence supporting the Board's majority decision is substantial, I must dissent. *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 488 (1950); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 230 (9th Cir. 1971). Rather, I agree with the two dissenting members of the Board that the plain meaning of the Union's waiver of initiation fees, which was communicated to the company employees four days before the union election, violated the rule of *NLRB v. Savair Manufacturing Co.*, 414 U. S. 270 (1973).

The three majority Board members' reading of the waiver by inserting the word "incoming" before "member" is unwarranted. The sentence, "There will be no initiation fee for any member presently working in the plant." must be read through the eyes of the employees of the company who were the targets of the waiver. It seems only natural to me that they concluded that they must *be presently working* there and *be members* of the union — prior to the election, not afterwards. I believe the minority Board members were entirely correct in their conclusion that the conditional waiver had the proscribed effect of allowing the union "to buy endorsements [from the employees] and thus painted a false portrait of employee support during its election campaign." *Savair*, 414 U. S. at 277.

I would deny enforcement.

United States Circuit Judge

FILED

MAY 15 1978

EMIL E. MELFI, JR.  
CLERK, U.S. COURT OF APPEALS

APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 75-3364

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

L. D. McFARLAND COMPANY, Respondent

JUDGMENT

Before: ELY and CHOY, Circuit Judges, and HALL,\* District Judge

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated July 28, 1975, against Respondent, L. D. McFarland Company, Eugene, Oregon, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on January 10, 1978, and has considered the briefs and transcript of record filed in this cause. On March 27, 1978, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Respondent, L. D. McFarland Company, Eugene, Oregon,

\*Honorable Peirson M. Hall, Senior District Judge, Central District of California, sitting by designation.

its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Willamette Valley District Council, Lumber and Sawmill Workers Union, (hereinafter called the Union) as the exclusive bargaining representative of its employees in the following appropriate unit:

All production, maintenance and transportation employees of the Employer employed at its pole and piling treating and manufacturing facility located on Highway 99 North, Eugene, Oregon, excepting and excluding office and office clerical employees, independent contractors and their employees, temporary employees and supervisors, plant guards and watchmen, and professional employees as defined in the Act, as amended.

(b) Announcing wage increases, night-shift differentials, improvements in paid vacations and employee health and welfare pensions, and other changes in working conditions without notice to or consultation with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, (hereinafter called the Act ).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Continue in full force and effect such wage increases, night-shift differentials, and improvements in paid vacations and health and welfare pensions granted its employees during the period of its unfair labor practices and the pending of these proceedings.

(c) Post at its facility located on Highway 99 North, Eugene, Oregon, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 19 (Seattle, Washington) of the National Labor Relations Board after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director, in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

Costs in this court in favor of Petitioner and against Respondent.

28 copies of Petitioner's brief	\$146.12
Record reproduction	15.50
	\$161.62

Endorsed, Judgment Filed and Entered

SO ORDERED:

/s/ Emil E. Melfi  
Emil E. Melfi  
Clerk

WALTER ELY  
Circuit Judge

/A TRUE COPY,

HERBERT Y. C. CHOY  
Circuit Judge

ATTEST: Emil E. Melfi  
Clerk

PEIRSON M. HALL, SR.  
U. S. District Judge

## APPENDIX

## NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Willamette Valley District Council, Lumber and Sawmill Workers Union, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT announce or grant wage increases, night-shift differentials, improvements in paid vacations and employee health and welfare pensions, or any other change in working conditions without notice to or consultation with Willamette Valley District Council, Lumber and Sawmill Workers Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production, maintenance and transportation employees of the Employer employed at its pole and piling treating and manufacturing facility located on Highway 99 North, Eugene, Oregon, excepting and excluding office and office clerical employees, independent contractors and their employees, temporary employees and supervisors, plant

guards and watchmen, and professional employees as defined in the Act, as amended.

L. D. McFARLAND COMPANY  
(Employer)

Dated	By	(Title)
	(Representative)	

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 310 Six Ten Broadway Building, 610 SW Broadway, Portland, Oregon 97205, Telephone 503-221-3085.

## APPENDIX D

**FILED**

MAY 4 1973

EMIL E. MELFII JR.  
CLERK, U.S. COURT OF APPEALSUNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 75-3364

**ORDER**

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

L. D. McFARLAND COMPANY, Respondent

*On Petition for Rehearing*Before: ELY and CHOY, Circuit Judges, and  
HALL, District Judge.\*

The Petition for Rehearing is denied.

\*Honorable Peirson M. Hall, Senior District Judge, Central District of California, sitting by designation.

## APPENDIX E

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

No. 36-CA-2575

L. D. McFARLAND COMPANY

and

WILLAMETTE VALLEY DISTRICT  
COUNCIL, LUMBER AND SAWMILL WORKERS  
UNION

## DECISION AND ORDER

Upon a charge filed on May 29, 1974, by Willamette Valley District Council, Lumber and Sawmill Workers Union, herein called the Union, and duly served on L. D. McFarland Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued a complaint on July 15, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 14, 1973, following a Board election in Case 36-RC-3067, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 36-RC-3067, as the term "record" is defined in Secs. 102.63 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

that, commencing on or about December 26, 1973, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On August 23, 1974, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 3, 1974, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 13, 1974, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a Motion for Summary Judgment and a response to Notice to Show Cause entitled "Employer's Opposition to General Counsel's Motion for Summary Judgment and Argument in Support of Employer's Motion for Summary Judgment."

Upon the entire record in this proceeding, the Board makes the following:

#### Ruling on the Motion for Summary Judgment

In its answer to the complaint, its briefs in opposition to the General Counsel's Motion for Summary Judgment, and its Motion for Summary Judgment, the Respondent basically attacks the Union's representative status and certification: (1) because the Union precluded the free choice of employees in the representation election in Case 36-RC-3067 by offering to waive full initiation fees for all employees who signed authorization cards before the election, a violation of the Act under the Supreme Court's decision in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U. S. 270 (1973), and (2) because the election was inadequately supervised and conducted by the responsible Board agent in that (a) persons who had already voted were allowed to remain at the polling place and engage in conversation with one another as to whether a particular individual was going to vote and (b) one person who was not on the list of eligible voters was not allowed to vote when he appeared after the polls had closed early.

Review of the record herein, including the record in Case 36-RC-3067, indicates that an election was conducted pursuant to a Stipulation for Certification Upon Consent Election on April 25, 1973, which resulted in a 16-to-13 vote in favor of the Union, with 2 challenged ballots. Respondent filed timely objections to conduct affecting the results of the election, alleging in substance that the Union had directly promised monetary gain or reward to employees in exchange for their votes in the election by offering to waive initiation fees and that the Board agent who conducted the election denied a ballot to a potential voter who appeared after the polls had closed, but during the posted time for the election to be held.

After an administrative investigation, the Regional Director issued his Report and Recommendations on Objections on July 12, 1973, in which he upheld the propriety of the Union's waiver of initiation fees and found that the potential voter was not eligible to vote because at the time in question he had been permanently laid off from work without any prospect of being recalled. Respondent filed timely exceptions to this report, reasserting its objections, adding an assertion concerning conversations which occurred near the polls while voting took place, and asserting that factual questions had been raised which required a hearing. Thereafter, the Board, on December 14, 1973, issued a Decision and Certification of Representative rejecting the exception as to polling place conversations as being conclusionary and untimely filed, rejecting the other exceptions as raising no substantial or material issues of fact or law warranting the reversal of the Regional Director's findings, conclusions, and recommendations, and certifying the Union.

The Respondent notes that prior to the representation election herein which was held on April 25, 1973, the Union transmitted a letter dated April 21, 1973, to the employees of the Employer, the pertinent portions of which stated that

THERE WILL BE NO MONTHLY DUES UNTIL A  
CONTRACT IS NEGOTIATED.

and

THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT.

The Respondent contends that the Supreme Court decision in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U. S. 270 (1973), issued after the Board's Decision and Certification of Representative, requires denial of the General Counsel's Motion for Summary Judgment. We find no merit in this contention.

The Union's waiver of dues applied until a contract was negotiated. Such waivers are permissible under the *Savair* decision, *supra*, in which the Supreme Court held prejudicial a waiver of an initiation fee conditioned on an employee's act of signing with the Union *prior* to the election.<sup>2</sup>

The Union's waiver of initiation fees was available to any member presently working in the plant. The requirement that an employee must be presently working in the plant is not objectionable because we have held in a similar case that "[W]hatsoever the impact of such a limitation it is clear that it would only affect those individuals hired after the election who, in any event, could not have participated in the election and could not have had any effect on its outcome."<sup>3</sup> The requirement that an employee be a "member" is not objectionable since such language places no requirement upon employees to join the Union before the election. In *Savair*, *supra*, the Supreme Court merely held that a union may not limit its waiver of initiation fees to those employees who sign cards prior to the election. The Court stated that "permitting the Union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election . . . allows the union to buy endorsements and paint a false portrait of employee support during the elec-

<sup>2</sup> See *Con-Pac, Inc.*, 210 NLRB No. 70 (1974), *affd.* 509 F.2d 270 (C.A. 5, 1975). See also *Irwindale Division, Lau Industries, a Division of Phillips Industries, Inc.*, 210 NLRB No. 42 (1974).

<sup>3</sup> *Endless Mold Inc.*, 210 NLRB No. 34 (1974) (waiver to "any employee employed by the employer when the union was voted in"); *Dunkirk Motor Inn, Inc., d/b/a Holiday Inn of Dunkirk Fredonia*, 211 NLRB No. 56 (1974) (waiver to "those employees presently employed").

tion campaign."<sup>4</sup> However, the Court noted, with approval, the Board's argument that unions have a valid interest in waiving initiation fees when the union has not yet been chosen as a bargaining representative, because "[e]mployees otherwise sympathetic to the union might [be] reluctant to pay out money before the union [has] done anything for them . . ."<sup>5</sup> The Court expressly recognized the legitimacy of waivers of the type involved here, which apply to employees who sign up for the union *after* the election as well as before declaring that the union's ". . . interest can be preserved as well by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election."<sup>6</sup>

In the instant case, we find the Union's conduct to be wholly consistent with the Supreme Court's teaching in *Savair*, for here, unlike *Savair*, there was not a waiver limited to those who signed a card for, or otherwise supported, the Union before the election. In this case, the Union's statements in no way implied that eligible voters would have to pay dues or initiation fees unless they joined the Union prior to the election. Rather, the employees would have received a waiver of dues and initiation fees even though they had become members of the Union after the election. Thus, the waiver of dues and initiation fees here was unconnected with support for the Union before the election, unrelated to a vote in the election, and without distinction between joining the Union before or after the election. Our colleagues, apparently see some vice in the Union's use of "members" as those for whom the waiver would be effective. But those becoming members are the only ones on whom an initiation fee is imposed, and we see nothing in the shorthand description of these as "members" to tie the waiver to preelection support, any more than we find in the remaining language of the waiver. Although our dissenting colleagues would have the

<sup>4</sup> 414 U. S. at 277.

<sup>5</sup> 414 U. S. 272-274, fn. 4.

<sup>6</sup> *Id.*

Union take steps to clarify these "ambiguities," we see nothing ambiguous or objectionable in the Union's statement set forth in its letter to employees dated April 21, 1973. Nor do we see anything in *Savair* to require such "clarification." Accordingly, we find that the Employer's objections to the election which are based on its interpretation of *Savair*, *supra*, are without merit.

To the extent that the Respondent is seeking relitigation of issues raised or which could have been raised in the representation case proceeding, it may not do so. For it is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>7</sup>

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a

<sup>7</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c). Unlike our dissenting colleagues, we reject the affidavit of employee Charles Finney which was presented for the first time on appeal to the Board as a part of the Employer's Motion for Summary Judgment. There is no showing by the Respondent that such "evidence" was newly discovered or previously unavailable. Nor is there any showing of special circumstances herein which would entitle the Respondent to relitigate, by a late affidavit without opportunity for the other side to cross-examine the affiant or introduce opposing evidence, issues which were or could have been litigated in the prior representation proceeding. Our colleagues regard the Finney affidavit and, apparently, the *Savair* issue as matters which could not have been litigated in the representation proceedings, because the *Savair* decision issued subsequently. But, from all that the facts show, the Employer could have presented Finney's affidavit in a timely fashion and as a part of its objections to the election, the Union's April 21, 1973, waiver by letter. The fact that *Savair* issued after the representation hearing herein did not preclude the Employer from raising the issue and presenting evidence (including as an affidavit from Finney) on it at the hearing, just as it did not preclude such timely presentation in *Savair* itself.

hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the General Counsel's Motion for Summary Judgment and deny the Respondent's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

### Findings of Fact

#### I. The Business of the Respondent

Respondent, L. D. McFarland Company, is an Oregon company with an office and sales facility located in Eugene, Oregon, engaged in manufacturing and selling lumber pressure treated wood products. During the past year, Respondent, in the course and conduct of its business operations, had gross sales across state lines in excess of \$100,000. During the past year, Respondent, in the course and conduct of its business operations, purchased and received goods and products valued in excess of \$50,000 directly from firms located outside the State of Oregon.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

#### II. The Labor Organization Involved

Willamette Valley District Council, Lumber and Sawmill Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

#### III. The Unfair Labor Practices

##### A. The Representation Proceeding

##### 1. The unit

The following employees of the Respondent constitute a

unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production, maintenance and transportation employees of the Employer employed at its pole and piling treating and manufacturing facility located on Highway 99 North, Eugene, Oregon, excepting and excluding office and office clerical employees, independent contractors and their employees, temporary employees and supervisors, plant guards and watchmen, and professional employees as defined in the Act, as amended.

## 2. The certification

On April 25, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 19, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 14, 1973, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

### *B. The Request To Bargain and Respondent's Refusal*

Commencing on or about December 26, 1973, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above described unit. Commencing on or about December 26, 1973, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

We further find that, on or about January 4, 1974, without notice to or consultation with the Union, Respondent announced a wage increase effective December 15, 1973, and that on or about March 22, 1974, without notice to or consultation with the Union, Respondent announced a 6-percent wage

increase effective June 1, 1974, establishment of night-shift differentials, improvements in paid vacations, improvements in employee health and welfare pensions, and other changes in working conditions, effective April 1, 1974.

Accordingly, we find that by engaging in such conduct the Respondent has, on and since the foregoing dates, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

### IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (C.A. 5, 1964), *cert. denied* 379

U. S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### Conclusions of Law

1. L. D. McFarland Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Willamette Valley District Council, Lumber and Sawmill Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production, maintenance and transportation employees of the Employer employed at its pole and piling treating and manufacturing facility located on Highway 99 North, Eugene, Oregon, excepting and excluding office and office clerical employees, independent contractors and their employees, temporary employees and supervisors, plant guards and watchmen, and professional employees as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 14, 1973, the above-named Labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 26, 1973, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By announcing a wage increase on January 4, 1974, effective December 15, 1973, and by announcing on March 22, 1974, a 6-percent wage increase effective June 1, 1974, establishment of night-shift differentials, improvements in paid vacations and employee health and welfare pensions, and other changes in working conditions, effective April 1, 1974, all of which occurred without notice to or consultation with the

Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, L. D. McFarland Company, Eugene, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Willamette Valley District Council, Lumber and Sawmill Workers Union, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production, maintenance and transportation employees of the Employer employed at its pole and piling treating and manufacturing facility located on Highway 99 North, Eugene, Oregon, excepting and excluding office and office clerical employees, independent contractors and their employees, temporary employees and supervisors, plant guards and watchmen, and professional employees as defined in the Act, as amended.

(b) Announcing wage increases, night-shift differentials, improvements in paid vacations and employee health and welfare pensions, and other changes in working

conditions without notice to or consultation with the Union.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

- (a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.
- (b) Continue in full force and effect such wage increases, night-shift differentials, and improvements in paid vacations and health and welfare pensions granted its employees during the period of its unfair labor practices and the pending of these proceedings.
- (c) Post at its facility located on Highway 99 North, Eugene, Oregon, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for Region 19 after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not

<sup>8</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

altered, defaced, or covered by any other material.

- (d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., July 28, 1975

Betty Southard Murphy, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBERS KENNEDY and PENELLO, dissenting:

Contrary to our colleagues, we find that the Union's conditional waiver of initiation fees violates the principles established by the Supreme Court in *N.L.R.B. v. Savair Manufacturing Co.*, 414 U. S. 270 (1973). Accordingly, we would deny General Counsel's Motion for Summary Judgment, grant Respondent's Motion for Summary Judgment, and dismiss the 8(a)(5) complaint in its entirety.

Four days before the election, the Union transmitted a letter to the employees which stated in pertinent part:

THERE WILL BE NO INITIATION FEE FOR ANY MEMBER PRESENTLY WORKING IN THE PLANT.

The majority finds this waiver to be permissible under *Savair*, *supra*, because it "in no way [implies] that eligible voters would have to pay . . . initiation fees unless they joined the Union prior to the election." In our view, the majority simply ignores the plain meaning of the waiver language.

In waiving initiation fees for "any member presently working in the plant," the Union has clearly established two prerequisites for qualifying for the waiver: (1) the individual must have been "presently working" at that point in time in the plant, and (2) the individual must be a "member." Accordingly, the conditional waiver does not apply to all employees in the unit — it applies to those who have become *union members* before the election.<sup>9</sup>

The waiver here represents precisely the type of improper "endorsement buying" which the Supreme Court sought to eradicate in *Savair*, *supra*. In the words of the Court:

By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip [i.e., joining

<sup>9</sup> Our colleagues thus err in stating that the limitations in the waiver "only affect those individuals hired after the election . . ." The limitations also affect those employees working on the date of the election who had chosen not to become union members up to that time. Compare *S & S Product Engineering Services, Inc.*, 210 NLRB No. 107 (1974), *enfd.* 513 F.2d 1311 (C.A. 6, 1975); *GTE Lenkurt, Incorporated*, 215 NLRB No. 53 (1974).

the union] prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign.<sup>10</sup>

Such is precisely the effect of the conditional waiver here.

The majority attempts to skirt the *Savair* issue through what effectively amounts to an administrative decree: "The requirement that an employee be a 'member' is not objectionable since such language places no requirement upon employees to join the Union before the election." From what source does the majority derive this conclusion? Certainly not from the Union's letter to the employees. If anything, the letter undermines their finding. In contrast to the waiver of initiation fees, monthly dues are waived "until a contract is negotiated" — a clear indication that only the waiver of monthly dues is applicable during the postelection period. If, as our colleagues now find, the Union had intended to afford similar treatment to the waiver of initiation fees, one could logically assume that similar clarifying language would have been utilized.

Nor can the majority support their finding through reliance upon preelection pronouncements of union officials. According to the sworn affidavit of employee Charles Finney, approximately 10 to 14 days before the election union representatives told the employees that those "who were or became members of the Union *prior to the election* would not have to pay any union initiation fee."<sup>11</sup> (Emphasis supplied.) This, of course, is exactly 180 degrees removed from what the majority finds.<sup>12</sup>

<sup>10</sup> 414 U. S. at 277.

<sup>11</sup> Contrary to our colleagues, we have no hesitation in relying upon the affidavit of Charles Finney. The affidavit deals exclusively with lawfulness of the waiver under *Savair*, *supra*. Since the *Savair* decision had not yet issued at the time of the representation proceedings, it is quite apparent that the Employer is not seeking to litigate issues "which were or could have been litigated in the prior representation proceedings."

<sup>12</sup> In addition it is clear that the Union did not intend the term "member" to be synonymous with "employee." In other parts of the letter it is apparent that the distinction between "member" and "employee" is recognized and preserved. For example, the letter is addressed to the "EM-

On the basis of the evidence adduced herein, our colleagues cannot definitively establish that the waiver was available to those employees who chose not to join the Union until after the election. The most they can hope to establish is that the terms of the qualified waiver are unclear with respect to the period of eligibility. The question then becomes who shall bear the burden of this ambiguity — the Union who authored the waiver or the employees who may have been misled into joining the Union prior to election in order to save the costs of paying the Union's initiation fee.

The Board's post-*Savair* decisions quite clearly — and in our judgment quite properly — place this burden on the Union.<sup>13</sup> In the three cited cases, the Board found that waivers limited to employees who were "charter members" or employees who had applied for "charter membership" were ambiguous because, as stated in *Inland Shoe, supra*, "it was not made clear whether employees' initiation fees would be waived for those signing after the election, or only prior thereto."<sup>14</sup> Thus, the same ambiguity existed in those cases as exists here — namely, the period during which an employee must become a "member" (or "charter member") in order to qualify for the waiver. In *Inland Shoe, supra*, the Board concluded that "it was Petitioner's duty to clarify that ambiguity or suffer whatever consequences might attach to employees' possible interpretations of the ambiguity."<sup>15</sup> As reflected in the affidavit of Charles Finney quoted earlier, the sole "clarification" offered by the Union here demonstrates that the waiver was available

EMPLOYEES OF McFARLAND COMPANY EUGENE DIVISION" and at one point states, "Our Union represents *employees* at McFarland's competitor's plant just a short distance away. We encourage you to contact any of our *members* at the J. H. Baxter plant . . ." (Emphasis supplied.)

<sup>13</sup> *Inland Shoe Manufacturing Co., Inc.*, 211 NLRB No. 73 (1974). *The Coleman Company, Inc.*, 212 NLRB No. 129 (1974); *D.A.B. Industries, Inc.*, 215 NLRB No. 96 (1974).

<sup>14</sup> *Inland Shoe, supra*, sl. op., p.5.

<sup>15</sup> *Inland Shoe, supra*, sl. op., p. 6.

only to those employees who joined the Union prior to the election.

For the foregoing reasons, we would deny General Counsel's Motion for Summary Judgment, grant Respondent's Motion for Summary Judgment, and dismiss the 8(a)(5) complaint in its entirety.

Dated, Washington, D. C. July 28, 1975

Ralph E. Kennedy, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with WILLAMETTE VALLEY DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT announce or grant wage increases, night-shift differentials, improvements in paid vacations and employees health and welfare pensions, or any other change in working conditions without notice to or consultation with WILLAMETTE VALLEY DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production, maintenance and transportation employees of the Employer employed at its pole and piling treating and manufacturing facility located on Highway 99 North, Eugene, Oregon, excepting and excluding office and office clerical employees, independent contractors and their employees, temporary employees and supervisors, plant guards and watchmen, and professional employees as de-

finer in the Act, as amended.

L. D. McFARLAND COMPANY  
(Employer)

Dated

19-CA-2575

By

(Representative)

(Title)

## APPENDIX F

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., 151, *et seq.*) are as follows:

TITLE I — AMENDMENT OF NATIONAL LABOR  
RELATIONS ACT

\* \* \* \* \*

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

\* \* \* \* \*

Sec. 8.(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

\* \* \* \* \*

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

\* \* \* \* \*

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

\* \* \* \* \*

(c) (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative as defined in section 9 (a); or

(B) \* \* \*

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and

shall certify the results thereof.

\* \* \* \* \*

(c) (4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

\* \* \* \* \*

## APPENDIX G

The following are believed relevant Regulations of the National Labor Relations Board:

29 C.F.R. Sec. 102.62:

(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a

description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70.

29 C.F.R. Sec. 102.67(f):

(f) The Parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

29 C.F.R. Sec. 102.69(a):

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition, may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional

director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made.

29 C.F.R. Sec. 102.69(c):

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on the other parties, any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, with supporting brief if desired, which shall be printed or otherwise legibly duplicated, except that

carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together with a copy of any brief filed on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in section 102.114 will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing of such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional

director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith.